special session to take up congressional redistricting. That first special session too was unproductive. By long-standing tradition, the Texas Senate will not consider a measure without support of a two-thirds supermajority.[3] Accordingly, when 11 of the 31 state senators declared their opposition to taking up congressional redistricting legislation, the redistricting effort was effectively killed. In response, Lieutenant Governor David Dewhurst announced that he would abandon the two-thirds rule for congressional redistricting, and a second special session was called. This time, quorum was broken in the Texas Senate when 11 senators left the State for Albuquerque, New Mexico.[4] But when one of them returned to the State a month later, Governor Perry called a third special session. That session did produce a new map, designated Plan 1374C, which was passed by the House and Senate in October 2003.

Plan 1374C was designed to protect all 15 Republican Members of Congress and to defeat at least 7 of the 17 Democratic Members.[5] It pursued this goal by deploying common gerrymandering tools. Compared to the court-drawn Plan 1151C, for example, the Republican Plan 1374C divided more counties into more pieces,[6] and produced districts that, on average, were much less compact, under either of the two measures the Legislature standardly employed.[7] The Plan also targeted all six Democrats who

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[3] Tr., Dec. 15, 2003, 8:30 a.m., at 7-8 (Sen. Bill Ratliff).

[4] Tr., Dec. 17, 2003, 1:00 p.m., at 119 (Sen. Royce West).

[5] Jackson Pls. Ex. 44 (Alford expert report) at 30.

[6] Jackson Pls. Ex. 141 (Gaddie expert report) at 5-6; Jackson Pls. Ex. 89.

[7] Jackson Pls. Ex. 141 (Gaddie expert report) at 6-7.

had won election in November 2002 on the strength of ticket-splitting voters by pairing them with other incumbents or by substantially increasing the number of Republicans in their districts. The Republican strategy proved extremely successful: The 2004 election (the first, and thus far only, election under the new plan) returned a congressional delegation consisting of 21 Republicans and 11 Democrats.

Texas voters residing in districts across the State challenged the 2003 plan as an unconstitutional partisan gerrymander (under the Equal Protection Clause, the First Amendment, and Article I of the Federal Constitution) and as a violation of both Section 2 of the Voting Rights Act and the racial-gerrymandering doctrine of *Shaw v. Reno*, 509 U.S. 630 (1993). The District Court rejected all these claims and upheld the 2003 map. *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004). With respect to the partisan gerrymandering claims, the District Court found as a fact that the legislature's entire motivation for redrawing the lawful court-drawn map mid-decade was partisan gain. *See, e.g., id.* at 470 ("There is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage."); *id.* at 472-73 ("Former Lieutenant Governor Bill Ratliff, one of the most highly regarded members of the Senate and commonly referred to as the conscience of the Senate, testified that political gain for the Republicans was 110% of the motivation for the Plan, that it was 'the entire motivation.'"). Nonetheless, the District Court concluded that the plaintiffs had failed to make out a successful legal claim under the standard set by *Davis v. Bandemer*, 478 U.S. 109 (1986).

This Court denied a stay, *Jackson v. Perry*, 540 U.S. 1147 (2004), but later vacated the ruling below and remanded the case for reconsideration in light of *Vieth*. On remand, the District Court noted that considerations other than partisanship influenced the precise location of all "the various cuts and turns of [the] redistricting plan," J.S. App. 15a n.38, but did not disavow its earlier findings that partisan maximization was the sole motive behind the legislature's decision to engage in off-cycle redistricting. Nonetheless, the District Court upheld the plan largely on the grounds that it was no "more partisan in motivation or result" than the Pennsylvania partisan gerrymander that survived review in *Vieth*, and that the plaintiffs had "not identified a way to invalidate the Texas plan under the standards they urge as surviving *Vieth*." J.S. App. 31a. Although the District Court acknowledged that the Texas and Pennsylvania gerrymanders differed in one respect that might be relevant to the construction of a judicially manageable standard – namely, that only the Texas redistricting was conducted off-cycle – it did not find that difference meaningful.

Charles Soechting, Chairman of the Texas Democratic Party, although nominally a defendant, vigorously opposed the 2003 gerrymander and has consistently supported the court-drawn plan. As an appellee who supports the appellants, he files this merits brief in accordance with the appellants' time schedule. *See* Supreme Court Rule 25.1.

SUMMARY OF THE ARGUMENT

In *Vieth v. Pennsylvania*, 541 U.S. 267 (2004), all nine Justices agreed that excessive partisanship in redistricting

is unconstitutional. *See id.* at 292-93 (plurality); *id.* at 316 (Kennedy, J., concurring in the judgment); *id.* at 336 (Stevens, J., dissenting); *id.* at 343-44 (Souter, J., dissenting); *id.* at 360-62 (Breyer, J., dissenting). Four Justices would nonetheless have held all claims of unconstitutionally excessive partisanship to be nonjusticiable. But a majority of the Court disagreed, with four Justices advocating particular tests for administering the constitutional ban on excessively partisan gerrymanders and a fifth, Justice Kennedy, finding no extant approach satisfactory. As Justice Kennedy recognized, "courts confront two obstacles" on the path to adjudicating claims of unconstitutionally excessive partisanship. *Id.* at 306 (Kennedy, J., concurring in the judgment). First, courts must learn to better conceptualize and articulate what it means for partisan motivation to be unconstitutionally excessive. Second, and logically subsequent, they must craft judicially manageable tests for administering or implementing the proper understanding of unconstitutionally excessive partisanship in redistricting. Of course, after these obstacles are surmounted, the third step is for the courts to apply the manageable tests or doctrines to the facts of individual cases.

Courts and academic commentators have long struggled to understand and articulate what it means for a partisan gerrymander to be unconstitutionally excessive. This struggle has not been only, or even mostly, attributable to inevitable differences of opinion regarding precisely where to locate the line between excessive and permissible. Instead, the lack of judicial and scholarly consensus on this question stems from uncertainty regarding how to think about partisanship-in-redistricting as a scalar property, as something that can be present to greater or

lesser degree. In particular, some judges and commentators have worried that amounts or degrees of partisanship must be understood by reference to the electoral outcomes that would have obtained had legislative seats been assigned in proportion to each party's share of the total vote cast. Others have thought that the extent of a plan's partisanship is a function of the extent of its departure from principles of objective or ideal fairness.

There is a different and more appropriate way to conceptualize amounts of partisanship – a conceptualization that does not require agreement on what would constitute an ideally fair redistricting plan and has no connection to the much-feared specter of proportional representation. Simply put, a plan is more or less partisan depending on how far the electoral outcomes its designers expected the plan to produce depart from the outcomes that would likely have obtained had the redistricter not been motivated by partisan objectives at all. That is to say, the partisanship of a plan is a function of the plan's distance from a counterfactual baseline (what the redistricter *would have* done), not from a normative baseline (what the redistricter *should have* done). It follows that a plan is *excessively* partisan, as a constitutional matter, if the redistricter sought too large a partisan advantage relative to what it likely would have realized had it not been motivated by partisanship.

Like all constitutional understandings that take the form of a standard rather than a hard-edged rule, this particular principle might be best enforced by means of a judicially crafted implementing doctrine. This set of appeals, however, does not require the Court to determine precisely what that doctrine should be in the context of ordinary once-per-decade redistricting. Because the

redistricting plan under challenge was adopted outside of the ordinary decennial redistricting cycle, it involves a clearly defined factual predicate ideally suited for the construction of manageable constitutional doctrine. The Court should announce that mid-decade redistricting plans adopted under conditions of one-party control are to be held unconstitutional unless the state proves that the plan is narrowly tailored to achieve a compelling state interest.

Indeed, off-cycle excessively partisan gerrymanders comprise the subset of all excessively partisan gerrymanders that is best suited to policing by means of clear, appropriate, and judicially manageable standards. In truth, the rule we propose is a paradigm of a "rule[] to limit and confine judicial intervention," *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). If the Court is not willing to draw a line here it will, by having established the *a fortiori* case, likely find itself forever unable to draw one.

If the Court announces the doctrine we propose, the proper result in this case is clear. The mid-decade redistricting engineered by the Texas Republican Party is not narrowly tailored to achieve any compelling interest and should, therefore, be struck down.

ARGUMENT

As an off-cycle redistricting, the 2003 Texas congressional redistricting plan should be subjected to strict scrutiny, and ultimately invalidated, as an unconstitutionally excessive partisan gerrymander.

Section A explains what it means for a redistricting to be tainted by excessive partisanship. Section B proposes and defends one judicially manageable standard for administering the understanding put forth in Section A. Section C applies the standard from Section B to the facts of this case.

A. The best understanding of what it means for partisanship in redistricting to be unconstitutionally excessive is that a party in control of redistricting may not pursue too much partisan advantage relative to the electoral success it would reasonably have expected had it not pursued partisan ends at all.

Given agreement that excessive partisanship in redistricting is unconstitutional, the question that comes immediately to mind is, as Justice Souter put it, "one of how much is too much." *Vieth,* 541 U.S. at 344 (Souter, J., dissenting); *id.* at 298 (plurality). But if that is the most obvious question, it is not the first. Before courts can intelligently decide how much partisanship is too much, they must develop a clearer understanding of what it means for partisanship to be present more or less, a lot or a little.

The Court has often acknowledged and carried out an obligation to draw lines – even more or less arbitrary lines – when constitutional concerns require that a line be drawn. *See, e.g., Burch v. Louisiana*, 441 U.S. 130, 137 (1979) (holding that conviction by a nonunanimous six-person jury violates the Sixth Amendment, and explaining that notwithstanding the absence of a "bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function [adequately]

. . . it is inevitable that lines must be drawn somewhere"); *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (holding that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized"); *Brown v. Thompson*, 462 U.S. 835, 841-42 (1983) (observing that an Equal Protection challenge to a state apportionment plan makes out a prima facie case, thereby imposing a burden of justification upon the state, if the maximum population deviation exceeds 10%, but not otherwise). Frequently, of course, Justices disagree among themselves over where to locate the constitutional line – they disagree, that is, over how much is too much or how little is too little or how small is too small. Such disagreements can coexist, however, with agreement about the characteristics in virtue of which challenged state action comes closer to, or farther from, that constitutional line – whether that characteristic is the number of persons serving as juror, the length in days of a potential sentence, or the disparity in district populations.

As a majority of the *Vieth* Court emphasized, however, the problem of unconstitutionally excessive partisanship is not like this. When *Vieth* was decided, we did not know – surely we did not have articulate agreement about – precisely how, or by virtue of what, a given redistricting plan would contain or reflect more or less partisanship. *See Vieth*, 541 U.S. at 297 (plurality) ("No test . . . can possibly be successful unless one knows what one is testing *for*."); *id.* at 307-09 (Kennedy, J., concurring in the judgment). This Section responds to precisely that problem. It explains how commentators have sometimes

thought about what a judicially manageable test of excessive partisanship ought to test for; shows why those views are mistaken; and argues for a better understanding.[8]

One temptation is to adopt what could be called a normative baseline – a standard of what an ideally fair redistricting plan would be. From this perspective, the measure of the partisanship behind any particular redistricting plan would be the extent to which it departs, for partisan reasons, from that standard of objective fairness. At some distance from the normative baseline, the degree of partisanship is fairly deemed excessive, making the plan unconstitutional.

Of course, a proponent of the idea that degrees of partisanship should be measured by reference to the "normative baseline" of an objectively fair redistricting plan would need to articulate how fairness itself ought to be determined. There are two basic alternatives. A first possibility is that the ideally fair plan is one that generates seats in proportion to a party's support in the state's electorate as a whole. Because opponents of judicial attempts to police partisan gerrymandering so often claim that proponents of judicial review harbor a secret (or open) attraction to the principle of proportional representation,[9] let us be perfectly clear: We believe that principles of proportional representation furnish the wrong way to think about amounts of partisanship.

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[8] A fuller analysis of this problem appears in Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 809-28 (2005).

[9] *See, e.g.*, *Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring); Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. Rev. 257 (1985).

If the fairness of a plan is not a function of the extent to which the electoral *outcomes* to which it gives rise approximate the outcomes that a system of proportional representation would produce, fairness might instead be a function of the extent to which the *inputs* relied upon in creating the plan approximate the ideally fair balance of inputs. Keep in mind that no plan is drawn randomly. All plans are designed based on some set of considerations or to further some range of values. Common and legitimate objectives in the shaping of electoral districts include (and are nearly limited to) the following: maintaining contiguity and compactness, following major geographical features like rivers and mountains, tracking political subdivisions, preserving communities of interest, ensuring no diminution in the voting strength of racial and ethnic minorities, protecting incumbents, securing public acceptance, maintaining the cores of prior districts to thereby enhance representatives' accountability to their constituents, and promoting party electoral success. If there existed some ideally fair way to balance these disparate values, then the greater a given plan's departure from this balance, the more partisan the plan would be (assuming that the departures are fairly explained on partisan grounds).

The problem, as Justice Kennedy bemoaned in *Vieth*, is that we lack any consensus regarding what the right balance of inputs is. "No substantive definition of fairness in districting seems to command general assent." 541 U.S. at 307 (Kennedy, J., concurring in the judgment). This is undeniably true. But the absence of either a present-day consensus or good evidence of a traditionally accepted standard does not signal that courts and litigants have not looked hard enough into the historical record. It signals

instead that *any proposed conception of amounts of partisanship that would rely on principles of fair districting is a mistaken conception of what it means for partisanship in redistricting to exist in greater or lesser degree.*

There is a different and better way to conceptualize amounts of partisanship: A plan is more or less partisan depending on how far the expected electoral outcomes depart, not from what would have been fair, but from the outcomes that would likely have obtained had the redistricter not been motivated by partisan objectives at all. That is to say, the partisanship of a plan is a function of the plan's distance from a counterfactual baseline (what the redistricter *would have* done), not from a normative baseline (what the redistricter *should have* done).

That these three ways to conceptualize amounts of partisanship – what one might call the "proportional representation," "fairness," and "counterfactual" conceptions – are, indeed, meaningfully different from one another can be illustrated with a simple hypothetical.

Imagine two states, X and Y, of roughly equal size and population – a population that, say, entitles each state to 20 seats in the House of Representatives. In State X, Party A enjoys a 55%-45% advantage over Party B in total electoral support and also controls the state legislature and the governorship. In State Y, the parties' roles are reversed: Party B consistently receives 55% of the total votes cast and controls the legislature and the governorship. In both states, nonpartisan expert commissions have been authorized by previous legislation to draw all necessary redistricting plans; by tradition, legislative endorsement of the commission-proposed plans has been pro forma.

Imagine further that the nonpartisan commissions have completed their work. The State X commission was chiefly motivated to maximize the average geometric compactness of districts, virtually without regard for conformity to the boundaries of political subdivisions. The State Y commission, in contrast, was principally concerned that district boundaries should, to the greatest extent possible, respect the integrity of political subdivisions. It sought to ensure that no district was egregiously noncompact but was unconcerned with average district compactness. As a consequence of this (radically simplified) sketch of the considerations each commission relied upon, the resulting maps have markedly dissimilar features. But because they were drawn by nonpartisan commissions, the plans share this in common: By hypothesis, neither was infected by partisan considerations, which is to say that no line was drawn based on predictions of how its placement would affect the political fortunes of either party. This is not to say that the fortunes of the parties under these plans are impossible to predict. Far from it. Given highly detailed political databases, the expected electoral outcomes of any proposed electoral map are predictable with fair (though not perfect) accuracy. That, of course, is what makes partisan gerrymandering possible. Suppose then that the State X plan was likely to produce a congressional delegation with 14 As and 6 Bs, and that the State Y plan was likely to produce a delegation consisting of 10 As and 10 Bs.

Finally, imagine that, in a sharp break with tradition, each state legislature decides not to accept its commission's plan. Believing that its commission was too interested in ensuring average district compactness, the State X legislature redraws the commission-proposed map to

produce greater conformity both with major geographical features like mountains and rivers and with the boundaries of political subdivisions like cities and counties. The legislature's substitute plan does not, however, alter each party's electoral prospects; like the commission plan it replaces, the legislature's plan is expected to produce a 14-6 advantage for Party A. Meanwhile the State Y legislature replaced the handiwork of its commission largely in order to improve Party B's electoral prospects. By reshaping the map in ways both large and small it produced and enacted a plan likely to give Party B a 13-7 edge in the state's congressional delegation.

After *Vieth*, the bottom-line constitutional question (a question that exists whether or not claims of partisan gerrymandering are justiciable) is whether either of the two enacted plans embodies unconstitutionally excessive partisanship. As we have been emphasizing, however, determining "how much is too much" depends first on knowing "what is more and what is less." So which of these two redistricting plans embodies more partisanship than the other, and is thus more likely to cross the constitutional line?

If the right way to think about amounts of partisanship is in terms of a plan's departure from what is "fair," and if fairness is determined by reference to outcomes under a scheme of proportional representation, then the plan adopted in State X is more partisan than that adopted in State Y. Or, if fairness remains the relevant touchstone, but what is fair depends upon the application of "comprehensive and neutral principles for drawing electoral boundaries," *Vieth*, 541 U.S. at 306-07 (Kennedy, J., concurring in the judgment), then we cannot yet know which scheme is more partisan. We would need first to

reach agreement on, among other things, the appropriate weight to give district compactness relative to other line-drawing considerations. But if "fairness" is the wrong baseline, and if a plan is more or less partisan depending on how far it departs from what the redistricter would have done had it not been motivated by partisan objectives at all, then State Y's plan is more partisan than State X's. We submit that this is the right answer, and that the counterfactual baseline furnishes the right way to think about amounts of partisanship in redistricting. Accordingly, the acknowledged absence of "agreed upon substantive principles of fairness in districting," *id.* at 307 (Kennedy, J., concurring in the judgment), is not itself a bar to meaningful judicial review.

It might be objected that judgments about States X and Y are possible in this hypothetical only because of the artificial set up. We can reach confident conclusions about what the legislatures of States X and Y would have done had they not considered partisan advantage at all only on the assumptions, first, that each legislature substituted a legislature-drawn map for one proposed by a nonpartisan commission and, second, that such substitutions were, in each state, unprecedented. In the real world, the objection might continue, courts will not be able to make the requisite counterfactual determinations.

As an *observation* this is certainly true. But if pressed as an *objection* to our analysis, it wholly misses the point. We are not, in this Section, proposing what we think is a judicially manageable standard. We are offering a conceptualization of amounts of partisanship in the belief that conceptualization is logically antecedent to the construction of sensible and manageable judicial doctrine. What

the Court should *do* with this proper conceptualization is the subject of Section B, *infra*.

That the "counterfactual baseline" conceptualization of amounts or degrees of partisanship we propose is correct is reinforced by considering a kindred problem – vindictive sentencing. As the Court has long recognized, "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (internal quotations omitted). Suppose, then, that a criminal defendant challenges his ten-year sentence on the ground that it unconstitutionally punishes him for exercising some constitutional right – say, the right to jury trial or the right to appeal.

Nobody would think that, in order to succeed, the challenger must establish that ten years is longer than what would have been fair.[10] For if redistricting is marked by a striking lack of agreement on any "principled, well-accepted rules of fairness," *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring in the judgment), the same is equally true of sentencing. As this Court has long recognized, not only does the Eighth Amendment "not mandate adoption of any one penological theory," but states have never reached "agreement on the purposes and objectives of the

[10] Even were establishing the sentence's "unfairness" sufficient to make out an Eighth Amendment violation, it is plainly not sufficient, let alone necessary, to demonstrate a violation of due process.

penal system." *Harmelin v. Michigan*, 501 U.S. 957, 998-99 (1991) (Kennedy, J., concurring in part and concurring in the judgment). To the contrary, "the federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation." *Id.* at 999. If legislatures disagree over what is the fair or appropriate sentencing range for different offenses, so too do individual sentencing judges reasonably disagree over the fair sentence to impose on any given defendant within a statutorily permissible range.

Precisely because of this dissensus regarding what fairness dictates, a sentencing judge violates the Due Process Clause not by imposing a sentence that is "unfair," but by imposing one that exceeds *what she would have imposed had she not been motivated by vindictiveness.* The relevant baseline for determining whether a given sentence is vindictive, hence unconstitutional, is not the sentence that *is* just in all respects but rather, as Judge Wald put it, the sentence that the sentencing judge "*believes* just in all respects." *United States v. Jones*, 997 F.2d 1475, 1484 (D.C. Cir. 1993) (en banc) (Wald, J., dissenting) (emphasis added). Or, as Judge Easterbrook expressed it, the constitutionally relevant "benchmark" is not what should have happened, but what "would have happened." *United States v. Klotz*, 943 F.2d 707, 710 (7th Cir. 1991).

This is the same way to think about partisanship in redistricting. The measure of partisanship has nothing to do with what some objective principles of fairness require and everything to do with what plan the redistricter would have crafted had it not been motivated by partisanship. Indeed, the analogy between redistricting and sentencing is revealing for another reason as well. By recognizing that

the true constitutional question is whether a sentencing authority was motivated by vindictiveness, courts did not thereby fool themselves into thinking that judicial implementation of this constitutional understanding requires reviewing courts to undertake a direct totality-of-the-circumstances inquiry into the sentencing judge's actual reasons for a challenged sentence. Instead, the Court set about debating what judicially manageable rules might adequately substitute for direct inquiry into the presence or absence of vindictiveness.[11] As we will explain, the same strategy is appropriate in the context of partisan gerrymandering.

B. As a way to administer the foregoing understanding of unconstitutionally excessive partisanship in redistricting, the Court should subject to strict scrutiny off-cycle redistricting plans adopted under conditions of single-party control.

Once armed with a better understanding of what, for constitutional purposes, excessive partisanship means,

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[11] *See, e.g., North Carolina v. Pearce*, 395 U.S. 711, 726 (1969) (announcing a new rule that a sentencing order that imposes a more severe sentence after retrial than the defendant had initially received will be adjudged unconstitutional unless the reasons for the increase are stated in the order itself); *Texas v. McCullough*, 475 U.S. 134, 142 (1986) (converting the *Pearce* rule into a presumption rebuttable by objective information); *Blackledge v. Perry*, 417 U.S. 21, 27-28 (1974) (holding that when a prosecutor initially indicts on a misdemeanor charge, and the defendant avails himself of a statutorily afforded trial de novo, the prosecutor may not reindict the defendant on a felony charge for the same conduct; and emphasizing that such a prophylactic rule is "not grounded upon the proposition that actual retaliatory motivation must inevitably exist").

how should the Court proceed? As Justice Scalia rightly observed in a different context, courts have three options. They "can avoid arbitrariness in their review only by policing the entire spectrum . . . , by policing none of it, or by adopting rules which subject to scrutiny certain well-defined classes of actions thought likely to come at or near the [unconstitutional] end of the spectrum." *American Trucking Ass'ns, Inc. v. Scheiner,* 483 U.S. 266, 305 (1987) (Scalia, J., dissenting).

A plurality of the *Vieth* Court advocated the second option – police no claims of unconstitutional partisan gerrymandering. Of course, a majority of the Court rejected that route, with Justice Kennedy emphasizing that even if that route were eventually to prove the wisest, to embrace that option now would be premature. *Vieth,* 541 U.S. at 309-11 (Kennedy, J., concurring in the judgment). And if a declaration of nonjusticiability would have been premature barely a year ago, it would be even more inappropriate today given, as Section A demonstrates, that substantial progress has already been made in conceptualizing constitutionally excessive partisanship. Consequently, the first and third options remain: subject all claims of excessive partisanship in redistricting to meaningful judicial scrutiny, or adopt rules which limit meaningful scrutiny to well-defined sub-classes of redistrictings that are claimed to issue from unconstitutionally excessive partisanship.

We do not prejudge whether the first option might, in time, prove most sensible if technological advances supply courts with adequately precise, predictable, and appropriate proxies for excessive partisanship in redistricting. Nonetheless, the third option is the more modest step and, for that reason, more to be desired if possible. The challenge

for a Court that hopes to pursue the third option, however, is to identify with reasonable particularity those classes of redistrictings which are disproportionately likely to embrace instances in which the redistricter pursued partisan ends to an unconstitutionally excessive degree. Naturally, there could be several different sets of circumstances, all describable in adequately clear and objective terms, in which a redistricter was especially likely to have been motivated by unrestrained partisan greed. So courts might, over time, develop a number of predicates for application of heightened scrutiny.

This litigation, however, furnishes opportunity for the construction of one in particular – the most obvious and the most needed. Were one to rack one's brains to imagine conditions under which a legislative redistricting is especially likely to have issued from excessive partisanship it would be hard to improve upon the circumstances that this case represents – namely, that the redistricting was undertaken voluntarily by a state legislature controlled by a single party. Redistricting is costly. As the scores of public hearings and the three special sessions that were required to pass the 2003 Texas plan attest, redistricting consumes time and resources that could be spent doing what legislators were elected to do – draft and pass legislation. Redistricting also produces instability. As the Colorado Supreme Court explained:

> If the districts were to change at the whim of the state legislature, members of Congress could frequently find their current constituents voting in a different district in subsequent elections. In that situation, a congressperson would be torn between effectively representing the current constituents and currying the favor of future constituents. Moreover, the time and effort that the

> constituents and the representative expend getting to know one another would be wasted if the districts continually change.

People ex rel. Salazar v. Davidson, 79 P.3d 1221, 1242 (Colo. 2003).

It is not surprising, therefore, that legislatures have historically not redistricted any more often than they must. Given the substantial costs of redistricting, a redistricting authority that chooses to do so when it need not must anticipate even more substantial benefits. And when a single party initiates and directs that voluntary redistricting, the benefits most to be expected are benefits *to that party*. In such a case, the sought-for prize must be especially great because a *voluntary* partisan gerrymander constitutes an unusually great threat to inter-party cooperation – as, once again, the Texas experience demonstrates. It follows that when a redistricting authority under one-party control engages in a voluntary off-cycle redistricting it is extremely likely to be motivated to satisfy a wholly immoderate partisan appetite. This Court should therefore announce that all such redistricting plans must be subject to strict scrutiny, and thus invalidated unless narrowly tailored to achieve a compelling state interest.

Again, to forestall possible misinterpretation, let us be clear: We do not contend that mid-decade redistricting is unconstitutional. Rather, we are advocating that the Court adopt what is commonly (if loosely) called a prophylactic rule.[12] Because mid-decade redistricting is so likely to be

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[12] In *Dickerson v. United States*, 530 U.S. 428 (2000), two Justices opined that the Court lacked constitutional authority to announce

(Continued on following page)

marred by unconstitutionally excessive partisanship, courts should invalidate mid-decade plans adopted under conditions of one-party control unless persuaded that they are narrowly tailored to achieve a compelling interest. In other words, the justification for strict scrutiny here is the same justification often claimed for the application of strict scrutiny to facially racial classifications – not because a compelling interest is always constitutionally required even if the relevant state actor was not in fact motivated by the constitutionally impermissible motives (*e.g.*, excessive partisanship, racial animus), but because the test serves, in an evidentiary manner, to "smoke out" whether the constitutionally impermissible motives were present or not. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

In short, the rule we propose ideally enables the Court to "subject to scrutiny [one] well-defined class[] of actions thought likely" to be unconstitutional. *Scheiner*, 483 U.S. at 305 (Scalia, J., dissenting). But that is not its only virtue. In addition to being the class of unconstitutionally partisan redistrictings easiest to police, it is also the class most in need of it, for excessively partisan redistrictings produce especially large social costs when they occur off-cycle.

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prophylactic rules. *Id.* at 445-46 (Scalia, J., joined by Thomas, J., dissenting). Seemingly, the rest of the Court disagreed. For a post-*Dickerson* analysis that clarifies the relationship between court-interpreted constitutional meaning and court-constructed constitutional doctrine, see Mitchell N. Berman, *Constitutional Decision Rules*, 90 Va. L. Rev. 1 (2004). This understanding is further developed and defended in Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 Va. L. Rev. 1649 (2005).

To understand why, recall Justice O'Connor's speculation in *Bandemer* that "political gerrymandering is a self-limiting enterprise." 478 U.S. at 152 (O'Connor, J., concurring) (citing Bruce Cain, *The Reapportionment Puzzle* 151-59 (1984)). Relying on the work of political scientist Bruce Cain, Justice O'Connor reasoned, in essence, as follows. The extremity of a gerrymander is a function of the extent to which the controlling party can make its own districts efficient (involving very small margins of victory) and the opposing party's districts inefficient (very large margins of victory). But the more efficient the district, the bigger the risk. Because the party itself and the individual incumbents will be somewhat risk averse, they will draw districts to produce larger cushions than rigorous pursuit of partisan advantage would seem to dictate.

There is surely *something* to the Cain-O'Connor analysis. But the efficiency that a party or an incumbent will tolerate is not only a function of its or her degree of risk aversion, it's also a function of the time horizon.[13] The

[13] Furthermore, the severity of a gerrymander is a function not only of the efficiency that the controlling party will tolerate (which is itself a function of the time between redistrictings), but also of the extent to which that party is willing to flout traditional districting criteria. The more noncompactness that partisan mapmakers are willing to tolerate, the bigger the cushion they can provide themselves to ameliorate risk. It is not surprising, therefore, that Cain's relatively sanguine assessment that partisan gerrymandering can be kept within acceptable bounds without judicial intervention seemed to rest on his assumption that redistricters won't "resort[] to wildly noncompact shapes." Cain, *The Reapportionment Puzzle* at 150. But as the Pennsylvania redistricting map reviewed in *Vieth* showed, and as Texas Plan 1374C reconfirms, this assumption is no longer sound, if ever it was. Given that the proportion of competitive districts has declined substantially over the two decades since *Bandemer*, while most observers believe that the severity of partisan gerrymandering has increased, the District Court's choice to characterize as "prescient" the *Bandemer*

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riskiness of any given district is inversely proportional to the expected margin of victory in the next election and directly proportional to the expected number of elections before the next redistricting – as Professor Cain's own analysis makes clear.[14] Therefore, Justice O'Connor's argument that political gerrymandering is likely to be self-limiting actually *presupposes* that redistricting will occur only once per decade. Significantly, if a party's control of the state legislature is secure, the mere *possibility* of off-cycle redistricting can be enough to embolden gerrymanders more extreme than would otherwise occur: The party can accept narrower expected margins of victory in its "own" districts than it otherwise would, so long as it can be confident that off-cycle redistricting will be possible if those highly efficient districts threaten to become too risky. So a regime that permits off-cycle redistricting is likely to produce more egregious gerrymanders *even when that option is not exercised.* For this reason, the tradition that district lines be redrawn only after the decennial census has made a change necessary constitutes the single greatest natural constraint on partisan gerrymandering.[15]

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concurrence's hope that partisan gerrymandering might in effect police itself, *see* J.S. App. 27a, is inexplicable.

[14] *See, e.g.*, Cain, *The Reapportionment Puzzle* at 152 (explaining that a majority party's willingness to gerrymander depends on its "estimate of *long-range* political and demographic trends") (emphasis added); *id.* at 156 (referring to one study that "suggests that whatever partisan advantage the controlling party gets from reapportionment tends to erode quickly over time with changes in the composition of districts," and concluding that "partisan gerrymandering is technically difficult because time and geography can undo the reapportioner's craft").

[15] This tradition limits partisan gerrymandering in another way, too. If legislatures are permitted to redistrict whenever they want, they

(Continued on following page)

In sum, the rule we propose – that voluntary off-cycle redistricting plans created by state districting bodies controlled by one party be subjected to strict scrutiny – represents ideal constitutional doctrine. It bears an appropriately tight relationship to the underlying constitutional violation, is easily managed by the judiciary, provides clear guidance to legislatures, will have the salutary effect of dampening the degree of partisanship even outside the confines of its application, and produces slight if any social costs.[16] If this is not an appropriate rule to administer the constitutional ban on excessive partisanship in redistricting, then nothing is.[17]

Not surprisingly, then, the District Court did contemplate the possibility of a judge-made prophylactic rule

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can choose to do so when the state government is fully in the hands of a single party. But permitting redistricting to occur only at specified times (after each decennial census is reported) increases the chance that the legislature to whom the obligation falls will be unable to advance strictly partisan goals. *See* Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. Rev. 751, 776-82 (2004).

[16] *Miranda v. Arizona*, 384 U.S. 436 (1966), which (as we will see) the District Court viewed as providing a revealing comparison in other respects, is relevant on this point as well. Even if wise on balance, that the *Miranda* doctrine produces substantial social costs cannot be denied. *See, e.g., Dickerson v. United States*, 530 U.S. at 444 ("The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result."). The cost of our proposed test, in contrast, is to discourage mid-decade redistricting – something that this nation has done just fine without through most of its history.

[17] A rule that subjects mid-decade redistrictings to heightened scrutiny can also be justified as a means to implement the Equal Protection Clause's prohibition on malapportionment. *See* Brief of Appellants Travis County, Texas, Gustavo Luis "Gus" Garcia, and City of Austin, Texas.

tailored to the context of mid-decade redistricting.[18] For such a rule to be announced, it said, would make this case "the *Miranda* of redistricting jurisprudence." J.S. App. 19a. It then rejected this course, however, by reasoning that

> [i]t is a much smaller step from the two underlying building blocks of *Miranda* – the due process and Sixth Amendment-based right to not be convicted upon an involuntary confession and an experience-based factual judgment of the inherently coercive environment of the station house – to the implementing prophylactic of *Miranda's* warning requirement. The baseline in *Miranda* was a settled constitutional principle, not an elusive condemnation of conduct that some would say is antithetical to American ideals and others would say is politics as old as the Republic itself.

Id. at 19a-20a.

In other words, the District Court concluded that a prophylactic rule addressed to off-cycle redistricting would be *less* supportable than was the *Miranda* prophylactic rule because the constitutional understanding that the *Miranda* Court sought to implement by means of prophylactic judge-announced doctrine was more secure, and

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[18] What we propose is not identical to what the District Court contemplated. For purposes of the argument in text, however, it is not essential to focus on the precise respects in which our formulations, both of the underlying constitutional understanding and of the proposed judge-crafted implementing doctrine, differ from what the District Court imagined.

because the *Miranda* prophylactic rule is more proportional to the underlying constitutional violation.[19]

In both respects, the District Court was mistaken. First, the constitutional rule that the *Miranda* majority chose to administer via the warnings requirement was not, as the District Court erroneously stated, "the due process and Sixth Amendment-based right to not be convicted upon an involuntary confession." It was the Fifth Amendment's guarantee that no person "shall be compelled in any criminal case to be a witness against himself." And far from being "settled constitutional principle," the proposition that the privilege against self-incrimination makes inadmissible statements that were compelled during police interrogation was both novel and resisted by four Justices in *Miranda* itself. *See Miranda v. Arizona*, 384 U.S. 436, 503 n.4 (1966) (Clark, J., dissenting); *id.* at 526-31 (White, J., joined by Harlan and Stewart, JJ., dissenting); *see also New York v. Quarles*, 467 U.S. 649, 654 (1984) ("In *Miranda* this Court for the first time extended the Fifth Amendment privilege against compulsory self-incrimination to individuals subjected to custodial interrogation by the police."). In contrast, all nine Members of the *Vieth* Court agreed that the Constitution forbids excessive partisanship in redistricting.

Second, the District Court's apparent belief that *Miranda's* prophylactic rule effectuated only a small degree of prophylaxis rests on a confusion. It may be true, as the District Court observed, that the "environment of

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[19] The District Court may also have believed that only the Supreme Court, and not itself, has authority to announce a prophylactic rule. *See* J.S. App. 19a (discussing what "the Supreme Court" could do).

the station house" is "inherently coercive." J.S. App. 19a. But that does not entail that all statements elicited during custodial interrogation were actually *compelled* within the meaning of the Fifth Amendment, which is the constitutional question. To the contrary, Members of this Court have suggested that the prophylactic swath cut by the *Miranda* warnings requirement is broad indeed. *See, e.g., Withrow v. Williams*, 507 U.S. 680, 702 (1993) (O'Connor, J., concurring in part and dissenting in part) (observing that, "'in the individual case, *Miranda's* preventive medicine [often] provides a remedy even to the defendant who has suffered no identifiable constitutional harm'") (quoting *Oregon v. Elstad*, 470 U.S. 298, 307 (1985); bracketed language in *Withrow*). For the reasons we have already given, however, to subject to strict scrutiny off-cycle redistrictings undertaken by a redistricting authority under single-party control would likely work an exceedingly modest degree of prophylaxis.[20]

In sum, the District Court was correct when observing in 2004 that "if the judiciary must rein in partisan gerrymandering," its best alternative would be to craft "limitations that focus upon the time and circumstances of partisan line-drawing." *Session v. Perry*, 298 F. Supp. 2d at 475. This Court's remand invited the District Court to do precisely that. The District Court's stated grounds for declining that invitation are plainly wrong.

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[20] Because the underlying constitutional violation we take from *Vieth* is broader than what the District Court contemplated, and because our proposed prophylactic rule is narrower than what the District Court entertained, *see supra* note 18, the doctrinal test we propose is much more proportional to the constitutional wrong than the District Court assumed.

C. The 2003 Texas congressional redistricting plan, which was adopted under conditions of single-party control, is not narrowly tailored to achieve a compelling interest, and should therefore be held unconstitutional.

Application of our proposed rule to the facts of this case is straightforward.

The rule's predicate is plainly satisfied. The 2003 Texas congressional redistricting plan was adopted when both houses of the state legislature were controlled by the Republican Party, as was the Governorship. As the minority party, the Democrats had no meaningful opportunity to affect the redistricting plan. Democratic legislators did not decamp to a Holiday Inn in Ardmore, Oklahoma for the free HBO.

While the District Court did not subject the redistricting plan to strict scrutiny, it is quite clear how the state would be compelled to argue were strict scrutiny to be applied. During the redistricting process, many Republican legislators announced candidly that the redistricting was designed to maximize their party's prospects for electoral success.[21] Once in litigation, however, their lawyers have sought to defend the plan as an effort to "remov[e] the dead-hand effect of the 1991 Democratic gerrymander." Motion to Affirm at 5, *Session v. Perry*, 298

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[21] Indeed, one of the chief legislative architects of the 2003 plan acknowledged at trial that congressman DeLay and the Republican leadership had set out to "get as many seats as we could." Tr., Dec. 18, 2003, 1:00 p.m., at 142 (trial testimony of State Rep. Phil King). As one Republican staffer had put it, Plan 1347C "should assure that Republicans keep the House [of Representatives] no matter the national mood." Jackson Pls. Ex. 129 (Joby Fortson e-mail message).

F. Supp. 2d 451 (E.D. Tex. 2004) (No. 03-1391). The District Court agreed that the record supports this characterization. J.S. App. 21a-22a.

We disagree with this finding. After all, the *Balderas* Court that drew Plan 1151C explained that it started with a blank map of Texas and then applied neutral districting factors. But even assuming arguendo both that the prior plan was a Democratic gerrymander, and that the dismantling of a prior gerrymander is a compelling state interest, any notion that the plan under review was narrowly tailored to further that interest is preposterous. All parties' experts agreed at trial that this gerrymander was so severe and anticompetitive that Republicans would continue holding at least 20 or 21 of the State's 32 seats even if Democrats once again became the dominant party in the Texas electorate.[22]

Concededly, the Court "ordinarily do[es] not decide in the first instance issues not resolved below." *Pierce County v. Guillen*, 537 U.S. 129, 148 n.10 (2003). But this is not an inexorable command. When proper application of legal test to the facts is as plain as in this case, the Court frequently applies the test on its own instead of remanding for an entirely predictable end result. *See, e.g., Illinois v. Lidster*, 540 U.S. 419, 427-28 (2004) (holding that the state supreme court had erred in applying a rule of automatic unconstitutionality to the checkpoint stop at issue, that the proper constitutional test was one of all-things-considered reasonableness, and that the checkpoint stop

[22] *See, e.g.*, Jackson Pls. Ex. 44 (Alford expert report) at 23-28, 34, 38; Jackson Pls. Ex. 141 (Gaddie expert report) at 3, 19, 24.

was reasonable); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268-71 (1977) (holding that plaintiffs had failed to prove a racially discriminatory purpose, as required by *Washington v. Davis*, 426 U.S. 229 (1976), even though *Davis* had been decided after the appellate court decision under review and the lower courts had not applied the *Davis* analysis).

Wisely, the Court has often refused to "be blind" to what "[a]ll others can see and understand." *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922). That the 2003 Texas congressional redistricting plan was not merely a narrowly drawn corrective to a supposedly prior Democratic gerrymander, but instead an extreme Republican gerrymander of its own, is common knowledge. For the sake of complying with procedural niceties, the Court should not affect ignorance of this truth – especially where, as here, the cost of a remand would be the holding of another election under an unconstitutional plan. *Cf. Troxel v. Granville*, 530 U.S. 57, 74 (2000) (declining to remand the case for further proceedings in the state court out of regard for the fact that "the burden of litigating a domestic relations proceeding can itself be 'so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated'") (quoting *id.* at 101 (Kennedy, J., dissenting)).

CONCLUSION

The Court should reverse the judgment below, and direct the District Court to reinstate the lawful plan it drew and unanimously adopted in 2001.

Respectfully submitted,

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GI FORUM OF TEXAS, *ET AL.*,

Appellants,

v.

RICK PERRY, *ET AL.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

BRIEF FOR APPELLANTS GI FORUM, *ET AL.*

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QUESTIONS PRESENTED

1. Whether an assertion of political partisanship is sufficient justification, under section 2 of the Voting Rights Act and the Constitution, to dismantle a Latino-majority congressional district to elect the Anglo-preferred candidate.

2. Whether section 2 permits a state to offset the elimination of a majority-minority district located in one area of the state by creating another majority-minority district in a different area of the state.

3. Whether section 2 demonstrative districts must be more compact and offer greater electoral opportunity to minority voters than the corresponding districts in the challenged redistricting plan.

4. Whether the number of majority-minority districts that can be created in the state functions as the upper limit of permissible political opportunity when assessing proportionality under *Johnson v. DeGrandy*, 512 U.S. 997 (1994).

LIST OF PARTIES

Plaintiffs and Plaintiff-Intervenors below:

"GI Forum" Plaintiffs-Appellants are American GI Forum of Texas; Simon Balderas; Gilberto Torres; Eli Romero; and League of United Latin American Citizens District 7. Other appellants include Travis County, Texas; City of Austin, Texas; Gustavo Luis "Gus" Garcia; Eddie Jackson; Barbara Marshall; Gertrude "Traci" Fisher; Hargie Faye Jacob-Savoy; Ealy Boyd; J. B. Mayfield; Roy Stanley; Phyllis Cottle; Molly Woods; Brian Manley; Tommy Adkisson; Samuel T. Biscoe; David James Butts; Ronald Knowlton Davis; Dorothy Dean; Wilhelmina R. Delco; Samuel Garcia; Lester Gibson; Eunice June Mitchell Givens; Margaret J. Gomez; Mack Ray Hernandez; Art Murillo; Richard Raymond; Ernesto Silva; Louis Simms; Clint Smith; Connie Sonnen; Alfred Thomas Stanley; Maria Lucina Ramirez Torres; Elisa Vasquez; Fernando Villareal; Willia Wooten; Ana Yañez-Correa; Mike Zuniga, Jr.; Chris Bell; Gene Green; Nick Lampson; Lester Bellow; Homer Guillory; John Bland; Reverend Willie Davis; League of United Latin American Citizens of Texas.

Defendants below:

State of Texas; Rick Perry, Governor of Texas; Roger Williams, Secretary of State of Texas; David Dewhurst, Lieutenant Governor of Texas; Tom Craddick, Speaker of the Texas House of Representatives; Charles Soechting, Chair of the Texas Democratic Party; Tina Benkiser, Chair of the Texas Republican Party.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
A. Factual Background	3
1. The Legislative Redistricting Plan (1374C)	4
2. The State Dismantled District 23 as an Opportunity District for Latinos	6
a. Congressman Bonilla is not the Latino candidate of choice in District 23	7
b. In 2002, District 23 was a Latino opportunity district	7
c. Increasing racially polarized voting in District 23 threatened Mr. Bonilla's incumbency	8
d. The State removed Latino population from District 23 to safeguard Mr. Bonilla's incumbency	9
e. The State ensured a nominal Latino-majority in District 23 to create the impression of Latino support for Mr. Bonilla	10

TABLE OF CONTENTS – Continued

Page

3. The State Crafted Seven Latino-Majority Districts in South and West Texas but Only Provided Political Opportunity in six 12

B. Procedural History 14

1. The District Court's Opinion 14

2. Judge Ward Issued a Strong Dissent in Support of GI Forum's Claims 18

3. The District Court's Opinion on Remand 21

SUMMARY OF THE ARGUMENT 22

ARGUMENT 24

I. STATES MAY NOT PURPOSEFULLY THWART GROWING MINORITY POLITICAL STRENGTH IN REDISTRICTING 24

II. DISMANTLING A LATINO OPPORTUNITY DISTRICT FOR THE SOLE PURPOSE OF ELECTING THE ANGLO-PREFERRED CANDIDATE VIOLATES THE CONSTITUTION AND THE VOTING RIGHTS ACT 27

A. There is Ample Evidence of the State's Intent to Discriminate Against Latinos in the Redrawing of District 23 29

B. The District Court Erred in not Applying Strict Scrutiny to the State's Reconfiguration of District 23 31

C. Protecting a Political Incumbent is not a Compelling State Interest Which Would Legitimize the State's Intentional Discrimination 32

TABLE OF CONTENTS – Continued

Page

D. The Election of a Latino Candidate in District 23 is Irrelevant Given That he is not the Minority's Representative of Choice 34

III. THE STATE PLAN DILUTES LATINO VOTING STRENGTH IN TEXAS..... 36

A. The Violation of Section 2 and the Equal Protection Clause Committed in District 23 is not Cured by the Creation of a new Majority Latino District Elsewhere in the State..... 36

B. The District Court Erroneously Required GI Forum's Demonstrative *Gingles* Districts to be More Compact and Provide Greater Electoral Opportunity Than Their Counterparts in the State's Plan..... 38

1. The GI Forum's Demonstrative Districts Were Compact Because They Exceeded the Compactness Standards of the Challenged Plan..... 41

2. The GI Forum's Demonstrative Districts Provided the Opportunity to Elect the Latino-preferred Candidate Because Latino-preferred Candidates Prevailed in Most or all Elections..... 43

C. The District Court Misapplied *DeGrandy* in Concluding That the First *Gingles* Precondition Operates as a cap on the Proportionality That can be Achieved by Minority Voters in a Redistricting Plan 46

CONCLUSION..... 49

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) 31, 33

Allen v. State Board of Elections, 393 U.S. 544 (1969) 25

Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977) 29, 30

Balderas v. Texas, No. 6:01-CV-158, slip op. (E.D. Tex. Nov. 14, 2001), *aff'd mem.*, 536 U.S. 919 (2002) ..... *passim*

Briscoe v. Bell, 432 U.S. 404 (1977) 27

Bush v. Vera, 517 U.S. 952 (1996) 42

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 31

City of Mobile v. Bolden, 446 U.S. 55 (1980), *superceded in part by statute* by 42 U.S.C. § 1973 28

Clark v. Calhoun County, Miss., 21 F.3d 92 (5th Cir. 1994) 41, 42

Cox v. Larios, 542 U.S. 947 (2004) 22

Davis v. Bandemer, 478 U.S. 109 (1986) 3, 49

Fairley v. Patterson, 393 U.S. 544 (1969) 25

Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) 28, 33

Graves v. Barnes, 343 F. Supp. 704 (1972) 26

GI Forum v. Texas, No. CV-03-124 (S.D. Tex. 2003) 14

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 22, 28

TABLE OF AUTHORITIES – Continued

Page

Growe v. Emison, 507 U.S. 25 (1993) 23, 41

Harper v. Virginia Board of Elections, 382 U.S. 951 (1966) 26

Henderson v. Perry, No. 2:03-CV-354 (E.D. Tex. June 9, 2005) 14

Hernandez v. Texas, 347 U.S. 475 (1954) 26

Hirabayashi v. United States, 320 U.S. 81 (1943) 31

Holder v. Hall, 512 U.S. 874 (1994) 44

Houston v. Lafayette County, 56 F.3d 606 (5th Cir. 1995) 41

Inhabitants of Del Rio Independent School District v. Jesus Salvatierra, 33 S.W. 2d 790 (Tex. Civ. App., 1930), *appeal dismissed, w.o.j., and cert. denied*, 284 U.S. 580 (1931) 27

Jackson v. Perry, 125 S. Ct. 351 (2004) 14

Johnson v. DeGrandy, 512 U.S. 997 (1994) ..... *passim*

Karcher v. Daggett, 462 U.S. 725 (1983) 44

Ketchum v. Byrne, Nos. 83-2044; 83-2065; 83-2126, 1984 U.S. App. LEXIS 19572 (7th Cir. 1984) 30

League of United Latin Am. Citizens v. N. E. Indep. Sch. Dist., 903 F. Supp. 1071 (W.D. Tex. 1995) 27

McLaughlin v. Florida, 379 U.S. 184 (1964) 27, 28

Miller v. Johnson, 515 U.S. 900 (1995) 22, 28, 31, 32

Moon v. Meadows, 952 F. Supp. 1141 (E.D. Va. 1997) 37

Muniz v. Beto, 434 F.2d 697 (5th Cir. 1970) 27

Nixon v. Condon, 286 U.S. 73 (1932) 26

TABLE OF AUTHORITIES – Continued

Page

Nixon v. Herndon, 273 U.S. 536 (1926) 26

Perkins v. Matthews, 400 U.S. 379 (1971) 25

Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000) 38, 44

Reynolds v. Sims, 377 U.S. 533 (1964) 49

Rogers v. Lodge, 458 U.S. 613 (1982) 22, 31

Rural W. Tennessee African-American Affairs Council v. Sundquist, 209 F.3d 835 (6th Cir. 2000) 37

Rybicki v. State Board of Elections, 574 F. Supp. 1082 (N.D. Ill. 1982) 30

Rural W. Tennessee African-American Affairs Council v. Sundquist, 209 F.3d 835 (6th Cir. 2000) 37

Seamon v. Upham, 536 F. Supp. 931 (E.D. Tex. 1982) 27

Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex. 2004) 1, 14, 27

Shaw v. Hunt, 517 U.S. 899 (1996) 18, 36, 37

Sierra v. El Paso Indep. Sch. Dist., 591 F. Supp. 802 (W.D. Tex. 1984) 27

Smith v. Allwright, 321 U.S. 649 (1944) 26

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 25

Stabler v. County of Thurston, Nebraska, 129 F.3d 1015 (8th Cir. 1997) 49

Thornburg v. Gingles, 478 U.S. 30 (1986) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

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United States v. Uvalde Consol. Indep. Sch. Dist., 625 F.2d 547 (5th Cir. 1980) 27

Vieth v. Jubelirer, 541 U.S. 267 (2004) ..... *passim*

Voinovich v. Quilter, 507 U.S. 146 (1993) 22, 24, 38

Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996) 27, 43

Washington v. Davis, 426 U.S. 229 (1976) 27, 29

Whitcomb v. Chavis, 403 U.S. 124 (1971) 31

White v. Regester, 412 U.S. 755 (1973) 26

CONSTITUTION AND STATUTES

U.S. Const. amend. XIV 1, 23, 31

U.S. Const. amend. XV 1, 23

28 U.S.C. § 1253 1

28 U.S.C. § 2101(b) 1

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 ..... *passim*

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 ..... 12, 25, 26, 36

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483 (1993) 5

OPINIONS AND ORDERS BELOW

The District Court's majority and concurring opinions following remand are reprinted in full in the Appendix to Appellant's Jurisdictional Statement ("J.S. App."). J.S. App. 1. The District Court's final judgment is reprinted in full at J.S. App. 59. The Order following trial of the case is reported at 298 F. Supp. 2d 451 (E.D. Tex. 2004) and is reprinted in full at J.S. App. 61.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1253 to review the District Court's order. GI Forum, *et al.* Appellants ("GI Forum") filed their timely notice of appeal on August 2, 2005. *See* 28 U.S.C. § 2101(b). J.S. App. 60.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Fifteenth Amendment to the United States Constitution provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, is reprinted at J.S. App. 218.